IN THE

Supreme Court of the United States

OCTOBER TERM, 1976:

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,
Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH; STATE OF INDIANA; CASPER W. WEINBERGER; SECRETARY OF HEALTH, EDUCATION AND WELFARE; PARK-VIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT WAYNE, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Lakeside Mercy Hospital, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, is reported at 421 F. Supp. 193 and appears in the appendix hereto. The

order of the Court of Appeals for the Seventh Circuit adopting the opinion of the District Judge is unpublished and appears in the appendix hereto.

JURISDICTION.

The order of the Court of Appeals of the Seventh Circuit was entered on December 30, 1976. A timely Petition for Rehearing and Suggestion for Rehearing in Banc was denied on January 27, 1977. A copy of the order appears in the appendix hereto. This Petition for Certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I. Whether in a program of cooperative federalism a state court has the subject matter jurisdiction to restrain a federal agency from complying with its federal regulations because the state court believes the federal law should be enforced[1] in a different manner from that expressed in the federal regulations.

II. Whether in a program of cooperative federalism a state's agreement "to conform to federal requirements" binds its judicial as well as its legislative branch.

III. Whether a federal right to agency review within time limits set by federal law under a program of cooperative federalism is a right within the ambit of rights and interests pro-

1. The selection of the word "enforce" for this issue was made by the court below:

> "Plaintiff contends that to allow a state court to interfere with the federally mandated timetable in this case would serve as precedent for allowing state courts to enjoin any federal agency proceeding. The crux of the matter is subject jurisdiction. Except where Congress places exclusive federal jurisdiction in the federal courts, there is no objection where a state court with jurisdiction over the parties enforces federal law." 421 F. Supp. at 202 (footnote 9), Petitioner's Appendix at 13.

The "federal law" which the state court "enforced" has never been identified and remains a mystery to this day.

tected by the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTION, STATUTE AND REGULATIONS.

Article VI, Clause 2 of the Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V of the Constitution provides:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

Amendment XIV, Section 1 of the Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Portions of § 1122 of the Social Security Act, 42 USC § 1320a-1(d)(1)(A)(B)(i) are as follows:

> "(d)(1) Except as provided in paragraph (2), if the Secretary determines that—
>
> (A) neither the planning agency designated in the agreement described in subsection (b) of this section nor an agency described in clause (ii) of subparagraph (B) of this paragraph had been given notice of any proposed capital expenditure (in accordance with such procedure or in such detail as may be required by such agency) at least 60 days prior to obligation for such expenditure; or (B)(i) the planning agency so designated or an agency so described had received such timely notice of the intention to make such capital expenditure and had, within a reasonable period after receiving such notice and prior

> to obligation for such expenditure, notified the person proposing such expenditure that the expenditure would not be in conformity with the standards, criteria, or plans developed by such agency or any other agency described in clause (ii) for adequate health care facilities in such State or in the area for which such other agency has responsibility, and"

Regulation 42 C. F. R. § 100.106 is lengthy and is set forth in the appendix hereto.

STATEMENT OF THE CASE.

This petition involves a controversy arising out of a program of cooperative federalism established by § 1122 of the Social Security Act (42 USC § 1320a-1) and its regulations. This program is designed to upgrade health care facilities throughout the nation by reimbursing through the repayment provisions of Medicare/Medicaid those persons who are about to make capital expenditures in an effort to create or expand health care facilities. Under this program, federal funds are provided to participating states for administration. States are not compelled to join this program. However, if a state decides to join the program in order to obtain federal funding, the provisions of § 1122 of the Social Security Act (42 USC § 1320a-1) and its regulations become binding on that state.

One of the provisions of the Social Security Act (42 USC § 1320a-1) which becomes binding on each participating state is the provision that each state shall designate an agency which shall be responsible for the administration of this program in that state. This agency then becomes known as the Designated Planning Agency of the United States Secretary of Health, Education and Welfare for that particular state. The role of the Designated Planning Agency ("DPA") is to review various applications for capital expenditure reimbursement submitted under this federal-state program and to decide which applicants should receive capital expenditure reimbursement from the federal government.

When each state designates a planning agency for the Secretary of Health, Education and Welfare ("the Secretary"), it agrees that this agency will "conform to federal requirements" expressed in the Social Security Act (42 USC § 1320a-1) and its regulations when reviewing the applications for capital expenditure reimbursement. Under 42 USC § 1320a-1, the "DPA" must review each application within a reasonable time after its submission. The regulations under 42 USC § 1320a-1 define this reasonable time for review by prescribing that the "DPA" must review each application within 60 days after its submission. Under the Act and Regulations, failure by the "DPA" to give notice of rejection of an application within the 60 days constitutes automatic approval of the application. Thus, each applicant is granted by the Regulations his own "time clock" consisting of 60 days. The Regulations state expressly that the only time when the "DPA" need not review an application within 60 days after its submission is when the applicant agrees to the delay in his review. Consequently, the Regulations prescribe that an applicant's "time clock" can only be tolled with the applicant's approval.

In the case at bar, Lakeside Mercy Hospital, Inc. ("Lakeside") was one of five applicants in Fort Wayne, Indiana, all of which were competing for the same capital expenditure reimbursement under 42 USC § 1320a-1 and its regulations. The State of Indiana had agreed to appoint the Indiana State Board of Health ("ISBH") as the Secretary's "DPA" for Indiana. Therefore, all five hospitals had submitted applications at different times to "ISBH" for its consideration.

In point of time the first application filed had been that of Community Hospital. In conformity with federal policy ISBH first conducted a review of the Community Hospital application, although other hospitals, including Lakeside, had applications pending during that review period. The Community Hospital application was rejected. Lakeside's application was next in point of time. Lakeside's 60 day review period of its application was to end in December, 1974.

Meanwhile, Community Hospital had filed an action in an Indiana state court seeking judicial review of ISBH's rejection of its application. It is this action by Community Hospital which is variously referred to in this petition as the state court action or lawsuit. Lakeside was not a party, nor was the Secretary a party. The parties were ISBH and the other competing hospitals.

On December 9, 1974, Lakeside had 15 days remaining on its "time clock" when the Indiana state court in the Community Hospital lawsuit, to which Lakeside was not a party, enjoined and restrained ISBH from acting upon all applications, including Lakeside's. The December restraint upon ISBH which continued until May 27, 1975, was not a judicial determination by the state court but was "entered with the consent of the parties." 421 F. Supp. at 203 (Petitioner's Appendix at 14-15). The "parties" to the consent decree were ISBH and the other hospitals which had competing applications with Lakeside.

Thereafter on May 27, 1975, in the above-described lawsuit, the state court determined that it had no subject matter jurisdiction to review the action of ISBH since it was "acting as an agency of the federal government." 421 F. Supp. at 197. (Petitioner's Appendix at 6.) The state court thereupon dismissed the Community Hospital complaint. The existing injunction was dissolved as to the competing hospitals. Notwithstanding, the state court issued a permanent injunction further prohibiting ISBH from acting specifically upon Lakeside's application.

Additionally, at that time, in contravention of federal policy that Lakeside was entitled to have its application processed on an individual basis in the order in which it had been filed, the state court ordered ISBH simultaneously to review the applications of the three competing hospitals with that of Lakeside's. The injunction against them having been dissolved but continued as to Lakeside, the three hospitals with the "encouragement" of ISBH (421 F. Supp. at 206-207. Petitioner's Appendix at 22) amended their previous individual applications and submitted a joint application. Thus, by the time the state court

permitted Lakeside to enter the starting gates, the rules had been substantially changed by the state court to the detriment of Lakeside.

Lakeside did not receive a review of its application or notice of rejection within the period of time required by the federal Act and Regulations. Failure of notification of rejection constituted automatic approval of Lakeside's application.

Therefore, in June, 1975, Lakeside filed its complaint in the District Court for deprivation of Civil Rights and for declaratory relief, alleging jurisdiction under §§ 1343(3) and (4), 1361, 1331, 28 USC, and charging that it had been deprived of its federal right for a prompt review. The District Court found that ISBH was an agency of the federal government (421 F. Supp. at 197, Petitioner's Appendix at 4), but contrary to the state court's own determination, the District Court decided that the state court had subject matter jurisdiction to enjoin the federal agency, ISBH, from complying with the federal law and regulations governing ISBH's activities as the Secretary's "DPA" (421 F. Supp. at 202 (Footnote 9), Petitioner's Appendix at 13), and granted a summary judgment against Lakeside.

By consent decrees in December, 1974, and judicial action in May, 1975, the state court created "inconsistency with such federal terms and conditions," namely: the running of Lakeside's federal "clock" was tolled by state court action from December 9, 1974, until June 30, 1975. The court below approved. (421 F. Supp. at 205, Petitioner's Appendix at 20.)

REASONS FOR GRANTING THE WRIT.

I.

This Petition should be granted by this Court because this case presents significant questions which this Court must inevitably decide. The importance of these questions stems from the fact that they arise out of a federal-state cooperative program.

"Schemes of Cooperative Federalism" is the generic term used to describe the multifarious federal-state programs which Congress has established to institute various important social-welfare policies. These schemes of cooperative federalism have been developed by Congress in this nation's recent past in an effort to promote a more efficient administration of federal funds to local areas while preserving and pursuing certain national social-welfare policies. Congress's novel attempt has met with much success and has resulted in a proliferation of these federal-state programs.[2]

The idea of cooperative federalism is a significant departure from the traditional American political idea that federalism meant a superior government with an inferior governmental enclave each separate and distinct running together in their own spheres with minimal contact and conflict. Cooperative federalism, on the other hand, introduces maximum contact between the two systems. The obvious result is a federal system of ever-increasing complexity and conflict.

Under the traditional political idea of federalism, a great body of law was developed by this Court in order to draw the power lines between the two systems. This case presents the overall question of whether this great body of law developed by this Court still has applicability to the novel idea of federalism represented by cooperative federalism. This greater question is but a composition of subsidiary questions all of which present a different aspect of this fundamental problem of the balance of power in our federal system.

Petitioner submits that this Court should review this case because the court below ignored the body of law developed by

2. Aid to the Aged, Blind, and Disabled (AABD); Old Age Assistance (OAA); Aid to Families with Dependent Children (AFDC); Aid to the Blind (AB); Aid to the Permanently and Totally Disabled (APTD); Federal Food Stamp Program; Aid to the Disabled (AD) are but a few of the many programs of cooperative federalism established by Congress to implement social-welfare policy.

this Court defining the distribution of power in our federal system. The only rationale supporting the result of this case as it now stands is that in schemes of cooperative federalism, traditional rules of jurisdiction and power have no applicability. In particular, and as will be discussed by sections A, B, and C immediately following, the case as it now stands indicates that traditional jurisdictional limitations imposed by established principles emanating from the Supremacy Clause, sovereign immunity, and the law of equity have no applicability to schemes of cooperative federalism.

(A)

This case presents the question of whether a state court has the subject matter jurisdiction to restrain a federal agency functioning under a program of cooperative federalism from complying with its federal regulations because the state court believes the federal law should be "enforced"[3] differently from that expressed in those regulations. If a state court does have this power, then the effect of Article VI, Clause 2 of the United States Constitution (Supremacy Clause) on federal agency regulations and activities vis a vis state courts must be re-defined to accommodate the new federalism represented by schemes of cooperative federalism. For as this Court has traditionally defined the Supremacy Clause's effect on the relationship between federal rules and activities and state courts, such state court action would clearly be prohibited.

This Court has established the rule of law that federal agency regulations have the same effect as Congressional enactments.[4] This rule was established so that federal agencies could without constant interference by the courts carry out the intent of Congress in areas in which complete Congressional legislation would be impractical. However, the result of this parity of federal

3. To understand why petitioner uses the word "enforce," and how this issue originated, see Footnote 1, *supra.*

4. *Federal Crop Ins. Corp.* v. *Merrill,* 332 U. S. 380 (1947).

regulations with Congressional acts is to make the following syllogism true: The Supremacy Clause makes all laws of the United States the supreme law of the land binding on every judge in every state; federal agency regulations are conterminous with the laws of the United States; federal regulations are binding on every judge in every state. Thus, under this view, the Supremacy Clause specifically denies a state court the subject matter jurisdiction to order a federal agency in a scheme of cooperative federalism not to comply with its federal regulations in an effort to enforce federal law differently from that expressed in the regulations. To hold otherwise means that either the federal regulations in federal-state cooperative programs are in some way different from other federal regulations or that the Supremacy Clause has a different effect on regulations in schemes of cooperative federalism. Either position draws an important distinction with untold effects on federal law.

If a state court is allowed to assume this power under schemes of cooperative federalism, then the traditional notion that the Supremacy Clause prohibits state court interference with federal agency activities involving only federal officials performing their duties must be altered. This Court has long ruled that a state court lacks subject matter jurisdiction to interfere with federal officials in the performance of their federal duties. *United States* v. *Tarble*, 13 Wall. U. S. 397 (1872); *Ableman* v. *Booth and United States* v. *Booth*, 21 How. U. S. 506 (1859); and *M'Clung* v. *Silliman*, 6 Wheat. U. S. 598 (1821). The general proposition enunciated by these cases is that due to the supreme authority of the United States and its law, no state court has jurisdiction to intrude into the sphere of the national government and interfere with federal officers executing its law. This concept was restated by Mr. Justice Frankfurter in *Feldman* v. *United States Oil & Ref. Co.*, 322 U. S. 487, 490, 491 (1944):

> "Conversely, a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere. The distinctive operations

> of the two governments within their respective spheres is basic to our federal constitutional system, howsoever complicated and difficult the practical accommodations to it may be."

This traditional concept of the Supremacy Clause's limiting effect upon state court jurisdiction directly conflicts with the concept that a state court can restrain a federal agency from following federal regulations in an effort to enforce federal law. Under the traditional concept, the regulation of this type of federal activity could only be accomplished by some governmental instrumentality in the federal sphere. Thus, to allow a state court to restrain a federal agency in a scheme of cooperative federalism from following its regulations would mean that the traditional notion of jurisdictional limitation imposed by the Supremacy Clause on state courts has no application in schemes of cooperative federalism.

Such departure from the traditional notion of the Supremacy Clause's jurisdictional limitations would have serious national ramifications. With the ever-increasing use of federal-state cooperative programs by Congress to institute important social-welfare policies, millions of Americans would be affected. If a state court is allowed this subject matter jurisdiction, then both Congress's purpose in establishing a federal-state cooperative program and the federal scheme of administration of such programs are subject to state court review and interpretation. Problems of national uniformity in the implementation of these programs would arise. And, finally, the extent of federal jurisdiction would be greatly altered by allowing a state court to assume powers heretofore in the exclusive jurisdiction of the federal courts. These possible ramifications give this question such importance that it merits the attention of this Court.

(B)

The first question for review poses problems as to the role of the doctrine of sovereign immunity in schemes of coopera-

tive federalism. Normally, a state court injunction restraining a federal agency from complying with its federal regulations would be viewed as one issued against the United States since the effect of the decree is to interfere with public administration and restrain the Government from acting. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1949); *Land* v. *Dollar*, 330 U. S. 731 (1947); and *Louisiana* v. *McAdoo*, 234 U. S. 627 (1914). Under the traditional concept of the doctrine of sovereign immunity, such state court action would be precluded.

This Court has attempted to outline the doctrine of sovereign immunity in the three landmark decisions of *Dugan* v. *Rank*, 372 U. S. 609 (1963); *Malone* v. *Bowdoin*, 369 U. S. 643 (1962); and *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*. In those cases, this Court decided that a United States official or agent could be sued only if it were alleged that the agent was acting outside the scope of the Congressional enabling statute or it were alleged that the agent was acting pursuant to an unconstitutional statute. This Court has not been presented with the issue of whether these allegations are necessary in order to maintain a suit against the federal government in schemes of cooperative federalism. This case, therefore, provides this Court an opportunity to decide this issue since the state court made no finding when restraining the federal agency from complying with its regulations that the regulations were either outside the scope of the enabling statute or unconstitutional.

If this Court decides that a state court in schemes of cooperative federalism can enforce federal law by restraining the federal agency from complying with its regulations, then this Court must decide that sovereign immunity has no application to these programs. Before reaching that result, this Court must decide that the policies behind sovereign immunity are not served or are outweighed by the reasons for allowing such jurisdiction.

The doctrine of sovereign immunity is a traditional legal

concept resulting from the weighing of the general public good achieved by unfettered federal governmental action versus the need to protect individual interests. On the one hand, this Court recognized that the federal government could not devise and administer federal programs which would serve the interests of each citizen of this nation and that to allow the interruption of the federal government's public administration by lawsuits instituted by those pursuing their own individual interests would force subservience of public interests to individual interests. On the other hand, certain individual interests had to be protected even if it meant additional hardships to public administration and public interests. The result of these antithetic considerations was for this Court to strike a compromise between them in *Dugan*, *Malone*, and *Larson*, *supra*. This Court decided to protect individual interests from federal governmental overreaching by allowing lawsuits when overreaching occurred; but, if the federal governmental body was acting within its constitutional and legal scope, then the individual's only resort was to the normal political process.

This Court is now being asked to decide the issue of whether this compromise is to apply to schemes of cooperative federalism. In the case at bar, a state court restrained a federal agency from following its regulations without a finding of overreaching in an attempt to enforce federal law in accommodation with local interests. The state court forced subservience of the federal scheme of public administration of this program to local interests. Due to the unique nature of schemes of cooperative federalism, it may be that the traditional concept of sovereign immunity has no application and that state courts should be able to malleableize programs of cooperative federalism to make them more responsive to local interests. However, with the possibility of an increase in litigation due to the complexity and conflict which cooperative federalism introduces to our federal system, perhaps a careful examination of all sides of this question will reveal a need to retain this doctrine. This may be especially true in

order to preserve the intent of Congress in pursuing national uniformity and national social-welfare policies as well as promoting the public interest through implementation of cooperative federalism. With such significant Congressional purpose in the balance, a careful review of this question by this Court is warranted before allowing the lower court's decision to stand.

(C)

If this Court allows state courts to have jurisdiction in schemes of cooperative federalism to enjoin federal agencies from complying with their regulations in order to enforce federal law differently from that expressed in the regulations, then this Court must discard a traditional rule of equity stating that a court has no power in equity to enjoin compliance with federal rules and regulations unless there is a finding that the rules and regulations are outside the scope of the Congressional enabling statute or unconstitutional. *Waite* v. *Macy*, 246 U. S. 606 (1918); *Colorado* v. *Toll*, 268 U. S. 228 (1925); *Wells* v. *Roper*, 246 U. S. 335 (1918); and *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165 (1893).

Two important factors contributed to the establishment of this equitable rule. First, this rule served to prohibit courts from substituting their interpretation of federal law through the exercise of their equitable powers for that of the federal agency created and designed by Congress to interpret and enforce that federal law. The rule developed out of this Court's recognition of the fact that a federal agency's expertise in a certain area of federal law makes that body better able to interpret and enforce the federal law than courts which lack this expertise. This Court has long ruled that courts should not substitute their judgment for that of a federal agency unless the latter is guilty of some overreaching. Another factor which contributed to the establishment of this equitable rule is this Court's desire to preserve the separation of powers. If state courts are allowed to freely substitute their interpretation of federal law for that of a

federal agency, are they not on the verge of exercising legislative powers rather than judicial powers?

A decision allowing state courts to enjoin federal agencies from complying with their regulations in order to enforce federal law signifies that state courts have finally achieved a status which enables them to substitute their interpretation of federal law for that of the federal agency created for such interpretation. Perhaps this new rule of law is justified so that state courts in schemes of cooperative federalism may temper federal law to make it more responsive to local interests. On the other hand, this new rule of law could result in as many interpretations of the federal law in a program of cooperative federalism as there are states. In the case at bar, the state court's interpretation of the federal law in an *ex parte* proceeding resulted in tolling the petitioner's period for review for approximately six months without even affording the petitioner a hearing in which the petitioner could present its reasons for objecting to such delay. Could not other state courts following the same logic toll other similar periods of review for eight, twelve, or even sixteen months under the guise of enforcement? Before this new rule is finally adopted this Court should review this question to insure that by its adoption Congress's social-welfare policies for the nation are served and not thwarted.

II.

Another significant question presented by this petition is the ability of the judicial branch of state governments in schemes of cooperative federalism to interfere with federal programs where the state has agreed "to conform to federal requirements."

With respect to the legislative branch in schemes of cooperative federalism, this Court, by reason of such agreement, decided that any state law or regulation inconsistent with federal terms and conditions is to that extent invalid. *King* v. *Smith*, 392 U. S. 309 (1968); *Carleson* v. *Remillard*, 406 U. S. 598 (1972) and *Townsend* v. *Swank*, 404 U. S. 282 (1971).

This Court also decided that a federal time requirement, specifically pertinent here, is binding on a state legislature and that any contrary state legislative action is invalid. *Rodriguez* v. *Swank* (1970), 318 F. Supp. 289 Aff'd 403 U. S. 901 (1971) and *Edelman* v. *Jordan*, 415 U. S. 651 (1974). In neither case was a state legislature allowed to vary the federal time requirement.

Unanswered by the Supreme Court is the question as to whether such an agreement by a state is binding upon its judicial branch.

The court below decided that the judicial branch of state governments can create inconsistency and conflict with federal requirements and policies by the interposition of consent decrees,[5] in particular, and state court action,[6] in general.

The decision below cast state courts in a role which the Supreme Court denied state legislatures.

If state courts are cast in a role different from state legislatures, a dangerous precedent will result. It will open the door for courts of each state to rewrite portions of federal statutes and regulations with which they disagree, as amply demonstrated in this case. A gradual erosion by the states of the prompt review and other requirements established by these statutes and regulations may begin, and thereby jeopardize the rights of many persons under the various federal-state social-welfare programs.[7]

5. In light of the instant case, this busy Court should pause to ponder what the consequences may be to federal requirements and to the federal rights of non-parties by the use of state court consent decrees.

6. State court action is state action. *NAACP* v. *Alabama*, 357 U. S. 449 (1958); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

7. Aid to the Aged, Blind, and Disabled (AABD); Old Age Assistance (OAA); Aid to Families with Dependent Children (AFDC); Aid to the Blind (AB); Aid to the Permanently and Totally Disabled (APTD); Federal Food Stamp Program; Aid to the Disabled (AD) are a few of the many programs of cooperative federalism which would be particularly vulnerable to state court interference since they have been, and constantly are, the targets of state legislative interference.

Moreover, this precedent will seriously undermine the intent of Congress in setting up programs of cooperative federalism which is to provide federal funds to the states with certain "strings attached" to assure that the states administer the funds with fairness, equality and uniformity throughout the Nation. The states are not compelled to join these programs: but if they decide to take the money, their courts as well as their legislatures must meet the obligations imposed. What had been mandatory federal regulations implementing this Congressional intent may now be reduced to such a weakened state as only to represent Congressional wishful thinking. Consequently, the matter presented is of exceptional importance meriting the attention and consideration of every member of this distinguished Court.

Therefore, as an important unanswered question in the federal-state relationship, this Court should now define the role of the state judicial branch, as it did in the case of the legislative. Especially, should the petition be granted since the decision below is devoid of any reference to, or reason for departure from, the great body of law establishing the binding effect of federal requirements upon states accepting federal funds.

III.

This Court has in innumerable decisions held that the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution protect a person's life, liberty, property, and fundamental rights. In the third question for review the petitioner is asking this Court to decide whether a federal right to agency review within time limits set by federal law under a program of cooperative federalism is a right within the ambit of rights and interests which are to be afforded the minimal safeguards of Due Process of law under the United States Constitution.

The answer to this question has considerable importance to the future guarantee of personal rights under our Constitution.

The question presents a federal right which cannot easily be classified within any one of the historic divisions of rights and interests protected under the Due Process clauses of the Fifth and Fourteenth Amendments. And yet, the federal right to agency review within the time limits set by federal law is more valuable to petitioner than most of the petitioner's property interests which clearly the Fifth and Fourteenth Amendments protect. The essence of this question is, therefore, whether the concept of Due Process is to be given an expansive meaning so as to include within its protection many rights and interests unknown at the founding of this nation but which now are vital guarantees to the welfare of individual citizens.

This Court has indicated that Due Process must be given an expansive meaning to function in our changed society. Pointing out the difficulty of classifying many rights and interests under the historic divisions, this Court stated in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), footnote 8:

"8. It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government; subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale LJ 1245, 1255 (1965). See also Reich, The New Property, 73 Yale LJ 733 (1964)."

This question likewise presents a type of right difficult to classify but around which our society is presently building.

A federal right to review within a definite time is an important right. Such federal right is found in most of our nation's social-welfare programs. Thus, a decision by this Court indicating the extent to which this right is to be safeguarded will have impact upon almost every citizen of this nation who expects or is receiving a benefit from the federal government. Without the very minimum safeguards which Due Process requires, these Americans may have only superficial rights. The case at bar presents a perfect example of how meaningless this federal right may be without Due Process safeguards.

In 1974 a hospital competing for capital expenditure reimbursement with this petitioner under § 1122 of the Social Security Act (42 USC § 1320a-1), had its application denied by the Secretary's "DPA" for Indiana. Soon thereafter, that hospital filed an action in an Indiana state court seeking judicial review of the "DPA's" action. Several other hospitals likewise competing with petitioner for capital expenditure reimbursement became parties to that lawsuit. The petitioner never became a party to the lawsuit.

On May 27, 1975, the state court in this lawsuit among the competing hospitals dismissed the action for lack of subject matter jurisdiction over the "DPA" since it was a federal agency. However, within the same breath that it was dismissing the action for lack of subject matter jurisdiction, the state court issued an injunction specifically enjoining the Secretary's "DPA" for Indiana from reviewing the petitioner's application within the time limits set by federal law. The state court specifically named the petitioner, Lakeside, in that injunction even though petitioner was not a party to that lawsuit. Even more egregious is the fact that the state court issued the injunction against petitioner without effecting service of process on petitioner by which

notice of the action and a chance to be heard could have been afforded petitioner.

Petitioner's federal right to review within established time limits was totally ignored in the above court action. Petitioner contends that if some court should attempt to alter his right to review, at the very least, the Due Process minimums of notice and an opportunity to be heard should be a pre-requisite to the court's action. Petitioner asks only from this Court that it be afforded the minimum constitutional protection of "fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Milliken* v. *Meyer*, 311 U. S. 457 (1940).

CONCLUSION.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Upon review, the error of the court below should be corrected. Since Lakeside did not receive a review of its application, or notice of rejection within the period of time required by the federal Act and Regulations, and since failure of notification of rejection constituted automatic approval of its application, Lakeside, as a matter of law, is entitled to a declaration that it receive reimbursement for capital expenditures.

Respectfully submitted,

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